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UNITED STATES

v.

MIKE GUZMAN, SR. AND MIKE GUZMAN, JR.

IBLA 74-301 Decided December 5, 1974

Appeal from decision of Chief Administrative Law Judge L. K. Luoma declaring the Queen and Driftwood placer mining claims null and void.

Affirmed in part, set aside in part and remanded.

1. Mining Claims: Withdrawn Land

Mining claims located subsequent to a first form reclamation withdrawal are void ab initio, since such lands are closed to entry under the general mining laws.

2. Mining Claims: Lode Claims -- Mining Claims: Placer Claims

Lode claims located for deposits of sand and gravel are void ab initio, since the law authorizing the location of lode claims provides no authority for the location of placer deposits of sand and gravel, and a relocation of the lode claims as placer claims in 1965 cannot relate back to and depend upon the lode claims for validity.

3. Mining Claims: Common Varieties of Minerals: Generally -- Mining Claims: Common Varieties of Minerals: Special Value -- Mining Claims: Common Varieties of Minerals: Unique Property

A deposit of sand and gravel used for ordinary purposes may be considered an uncommon variety of such material only if the deposit will command an economic advantage over ordinary deposits of sand and gravel due to a unique property which imparts the special and distinct value to the deposit.

4. Mining Claims: Common Varieties of Minerals: Generally

Common varieties of a particular mineral material do not have to be physically alike or equally desirable for a given purpose. When the evidence shows that other deposits occur commonly in the area and are similarly used, the fact that the subject deposit has qualities which are particularly well suited to that purpose does not, of itself, alter its essential character as a common variety material.

5. Mining Claims: Common Varieties of Minerals: Generally

Where a particular mineral material is common, abundant and widespread, certain deposits are bound to exist in closer proximity to the market than other such deposits, but this is only an extrinsic factor which does not make the material any less common.

6. Mining Claims: Lands Subject to -- Mining Claims: Special Acts -- Mining Claims: Withdrawn Land -- Withdrawals and Reservations: Effect of

R.S. 2332, 30 U.S.C. § 38 (1970), is not an independent adverse possession statute. It is part of the general mining laws, and necessarily assumes that any lands claimed under that statute were open to entry and patent under the mining laws. It has no application to a trespass on land which is closed to mineral entry by withdrawal or reservation, and compliance with the terms of the statute will not "cure" the invalidity of a mining claim located on land which was not open to entry and appropriation under the mining laws.

7. Mining Claims: Generally -- Mining Claims: Location -- Mining Claims: Special Acts

Technical deficiencies in the manner or method of the location and recordation are not material to the assertion of a claim perfected pursuant to R.S. 2332,

30 U.S.C. § 38 (1970). The provision offers an alternative to proving strict compliance with the laws applicable to lode and placer location, and a claimant under this provision is not required to produce record evidence of his location or to give any reason for not producing such evidence.

8. Mining Claims: Generally -- Mining Claims: Location -- Mining Claims: Special Acts

If the claimants possess the essential qualifications as to citizenship, and if they peacefully entered and occupied the land and discovered a valuable deposit of common variety of mineral thereon at a time when both the land and the mineral were subject to appropriation under the mining laws, and if they thereafter remained in peaceful, exclusive possession and openly worked the claim for the period prescribed by the state statute of limitations for mining claims, and expended at least the minimum amount of money prescribed by law in the

improvement of the claim, all such actions having been accomplished prior to July 23, 1955, they have thereby established their right to receive a patent pursuant to 30 U.S.C. § 38 (1970) notwithstanding their failure to file a location notice initially and despite their error in subsequently locating and recording their claim under the statute pertaining to lode locations rather than properly under the placer mining law.

9. Administrative Procedure: Generally -- Appeals -- Evidence: Generally -- Contests and Protests: Generally -- Hearings

Where the evidence adduced at the hearing of the contest of the validity of a mining claim is inadequate to establish whether the claimants have earned the right to receive a patent pursuant to 30 U.S.C. § 38 (1970), the case will be remanded for the taking of further evidence and the rendering of a decision limited to that issue.

APPEARANCES: Richard L. Fowler, Esq., Office of the General Counsel, Department of Agriculture, Albuquerque, New Mexico, for appellee; Hale C. Tognoni, Esq., Phoenix, Arizona, for appellants.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Mike Guzman, Sr., and Mike Guzman, Jr., have appealed from the March 12, 1974, decision of Chief Administrative Law Judge L. K. Luoma holding that the Queen and Driftwood placer mining claims are null and void. 1/ That decision resulted from contest proceedings initiated by the Bureau of Land Management at the request of the Forest Service. The contest complaint charged, inter alia, that there had been no discovery of a valuable mineral deposit on the claims. The complaint further charged that the sand and gravel found on the claims are a common variety of sand and gravel within the meaning of section 3, of the Act of July 23, 1955, as amended, 30 U.S.C. § 611 (1970), and consequently, not subject to location under the general mining laws, 30 U.S.C. § 21 et seq. (1970).

The first issue is the date of the location of these claims. If they were validly located prior to July 23, 1955, then the sand

1/ The Queen and Driftwood placer mining claims are located in sections 3 and 2, respectively, T. 2 S., R. 11 E., GSR Meridian, Tonto National Forest, Arizona. Both claims are situated in the bed of Queen Creek.

and gravel on the claims may constitute a valuable mineral deposit locatable under the U.S. mining laws, even if that material is a common variety of sand and gravel. If, however, the claims were not located until after July 23, 1955, then the claims cannot be valid unless the sand and gravel found thereon is an uncommon variety of that material. 30 U.S.C. § 611 (1970).

Appellants assert that they located both the Queen and Driftwood claims in 1941, but did not record them. Appellants testified that they have removed sand and gravel deposits along the channel of Queen Creek from an area between both claims since 1941 (Tr. 134). Appellants then located two lode claims on April 14, 1955, known as the Queen and Driftwood lode claims. In 1965, they located the present Queen and Driftwood placer mining claims for the same deposits of sand and gravel. Finally, in 1966, as the result of a contest proceeding, the lode claims were declared null and void by a Hearing Examiner. An appeal of this decision to the Director, Bureau of Land Management was dismissed, and no further appeal was taken in this case.

[1] Appellants argue that the 1965 location of the placer claims should relate back to the original locations, or at least to the 1955 lode locations. That argument is untenable. First, with respect to both the Queen placer and the Queen lode, the land on which they are located was removed from mineral entry by a first

form reclamation withdrawal in 1925 (Ex. 7). See M. G. Johnson, 78 I.D. 107 (1971). The land was not reopened to mineral entry until 1963, PLO 2897, 28 F.R. 1045 (1963). Mining claims located on lands withdrawn from entry are void ab initio and gain the locator no rights either at the time of location or at any later date. Mickey G. Shaulis, 11 IBLA 116 (1973); Frank Zappia, 10 IBLA 178, 183 (1973). Moreover, the Queen placer cannot be regarded as an amendment of the Queen lode because the placer claim occupies entirely different land at some distance from the lode location, involving different workings. The two claims are unrelated. Therefore the first potentially valid location of the Queen placer mining claim took place in 1965.

[2] The Driftwood lode claim was located in part on withdrawn lands. That portion of the claim is also void. The Driftwood placer does embrace part of the same land and workings which were formerly claimed under the Driftwood lode location. However, the entire Driftwood lode claim is void for another reason: the claim was located as a lode claim and not as a placer. One of the most fundamental distinctions in mining law is the distinction between placer deposits and lode deposits. Lode deposits are defined by statute as "* * * veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits * * *" 30 U.S.C. § 23 (1970). See e.g., Jefferson-Montana Copper Mines Co., 41 L.D. 320 (1912). Placer deposits are likewise defined by statute as all mineral deposits other than lodes. 30 U.S.C. § 35 (1970). The distinguishing test which determines whether or not a valuable

mineral deposit may be secured by a lode claim or by a placer claim is the form and character of the deposit. If it is in a vein or lode in rock in place, it may be secured by a lode claim, and it may not be by a placer claim. If it is not in a vein or lode in rock in place, it may be secured by a placer claim, and may not be by a lode claim. Webb v. American Asphaltum Mining Co., 157 F. 203 (8th Cir. 1907). The most typical example of a placer deposit is a deposit of sand and gravel. See e.g., A. Dictionary of Mining, Minerals, and Related Terms, 829 (1968) and Webster's New International Dictionary, 1877 (2d ed. 1949). It is also a fundamental rule of mining law that placer deposits are subject to location and patent only under the law applicable to placer claims. Henderson v. Fulton, 35 L.D. 652, 663 (1907); see also Cole v. Ralph, 252 U.S. 286, 295 (1920); Helen V. Wells, 54 I.D. 306 (1933); United States v. Stevens, 77 I.D. 97, 103 (1970). Likewise, a lode discovery will not sustain a placer mining location. Big Pine Mining Corp., 53 I.D. 410 (1931). Therefore, both the Driftwood and Queen lode claims were invalid from their inception for the reason that sand and gravel are locatable only under the law pertaining to placer deposits. Layman v. Ellis, 52 L.D. 714, 722 (1929). Since both the Queen and Driftwood lode claims have been invalid from their inception, their relocation as placer claims in 1965 cannot relate back to and depend upon the lode claims for validity.

[3] The Act of July 23, 1955, 30 U.S.C. § 611 (1970), amended the Materials Act of 1947, 30 U.S.C. § 601 (1970), to provide that:

> No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws * * *. "Common varieties" * * * does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *.

The purpose of that Act has been stated by the Supreme Court in United States v. Coleman, 390 U.S. 599, 604 (1968):

> * * * The legislative history makes clear that this Act (30 U.S.C. § 611) was intended to remove common types of sand, gravel, and stone from the coverage of the mining laws, under which they served as a basis for claims to land patents, and to place the disposition of such materials under the Materials Act of 1947, 61 Stat. 681, 30 U.S.C. § 601, which provides for the sale of such materials without disposing of the land on which they are found. * * *

Appellants have pointed out that one of the principal reasons why Congress wanted common varieties of sand, gravel, and building materials to be removed from entry under the general mining laws was to prevent certain widespread abuses that occurred under that mining law. In particular, Congress wished to prevent people from acquiring lands valuable for recreation, timber, and wildlife based on discovery of common varieties of certain materials, when, in fact, the locators of those materials had no intention of ever mining them but simply wanted a site for a cabin or other nonmining purposes. See, e.g., 1955 U.S. Code Cong. & Ad. News 2477. Conceding that this was one

of the purposes of the Act of July 23, 1955, it is nevertheless clear that after that date, no deposit of a common variety of sand and gravel could be located under the general mining law. Consequently, in order for the Queen and Driftwood placer claims to be valid, the sand and gravel deposits found thereon must not be a common variety of sand and gravel, because they were located in 1965, ten years after common sand and gravel was closed to appropriation under the mining law.

The various tests developed by the Secretary of the Interior to determine whether a particular deposit is an uncommon variety of sand, gravel, or building stone has been summarized by the Court of Appeals for the Ninth Circuit: (1) there must be a comparison of the mineral deposit in question with other deposits of such minerals generally; (2) the mineral deposit in question must have a unique property; (3) the unique property must give the deposit a distinct and special value; (4) if the special value is for uses to which ordinary varieties of the mineral are put, the deposit must have some distinct and special value for such use; and (5) the distinct and special economic value may be reflected by the higher price which the material commands in the market place, or by reduced cost or overhead so that the profit to the producer would be substantially more. McClarty v. Secretary of the Interior, 408 F.2d 907, 908 (9th Cir. 1969).

In addition to those guidelines for determining whether a material is a common variety, the mining claims, to be considered valid, would have to meet the normal tests of validity for any mining claim.

Essentially, the mineral deposit found on the claim must be reasonably perceived to be capable of extraction, removal, and marketing at a profit. See United States v. Coleman, supra. When the United States contests a mining claim, it has the burden of presenting a prima facie case that the claim is invalid. The burden then shifts to the claimant to show by a preponderance of the evidence that the claim is valid, for it is the claimants who are the proponents of an order to declare their claim valid. United States v. Springer, 8 IBLA 123 (1972), aff'd., 491 F.2d 239, 242 (9th Cir. 1974), cert. denied, U.S. (1974); Foster v. Seaton, 271 F.2d 836, 838 (D. C. Cir. 1959).

The testimony regarding the extent of utilization and marketability of the material found on these claims is both sketchy and conflicting. (Tr. 66, 67, 94, 96, 220) (Ex. L, M, R). Nevertheless, it is clear that for some thirty years the appellants have been selling the sand and gravel from the area of these claims, both separately and as an ingredient in their ready-mix concrete. While actual mining operations are not required to prove marketability, we have held that actual profitable mining operations are the best evidence of a valuable mineral deposit. United States v. McKenzie, 4 IBLA 97, 100 (1971). Since the appellants have a profitable ongoing mining operation, the marketability of the deposit in question is fairly obvious.

Appellants have compared the sand and gravel found on their claims with other sand and gravel deposits found in this area.

Appellants assert that the characteristic which makes this deposit of sand and gravel unique is the angularity of the particles (Tr. 226). They attribute this unusual angularity to both the sand and the gravel. The appellants' assertion as to the uniqueness of the deposit was corroborated by both of appellants' expert witnesses (Tr. 263, 278). Both appellants and their expert witnesses testified that the angularity of the gravel and also the absence of deleterious materials associated with the deposit combine to make an excellent "high test concrete". (Tr. 226, 263, 285.) The only example of what was meant by "high test" or "high grade" concrete was the suggestion that appellants' concrete could be used for lining mine shafts (Tr. 226, 286). However, the government's mineral examiner testified that while the sand and gravel was well suited for making concrete used for lining mine shafts, such concrete was not as permanent as that used in dams (Tr. 92). At any rate, the use of material for construction purposes is only a common use. United States v. Henderson, 68 I.D. 26, 29 (1961). And for material used only for common purposes to be considered an uncommon variety, it must have some special and distinct value in an economic sense over and above the common run of such material. McClarty v. Secretary of the Interior, supra.

The only evidence offered by appellants which suggests some special value are statements by Mike Guzman, Jr., and by an expert witness, Dudley L. Davis. Guzman testified that for some grades of

concrete mixes, appellants receive "roughly" one dollar more per cubic yard than competitors receive, although he could not make specific comparisons with his competitors' prices because, ". . . there's so many mixes and all that that would be hard to tell . . ." (Tr. 232, 233.) However, in some areas, the price appellants receive is the same as the competitor's price (Tr. 233). Guzman also testified that his company had been awarded contracts despite the fact that competitors had underbid his price by offering to sell concrete at a lower price per yard. However, a number of factors other than the physical peculiarities of Guzmans' sand and gravel may have influenced the buyer's decision in these instances, such as the Guzmans' size, reliability and reputation, as compared to the low bidders'. Or, their competitors' product may be sub-standard without establishing that material from the Guzman claims is an uncommon variety. One of appellants' expert witnesses stated one user was "willing to pay a little more" for a better grade of concrete (Tr. 287). Other than those statements, there is not one shred of evidence to indicate that appellants ever actually received more for their concrete than any of their competitors. Appellants did not produce a single receipt showing that they received more than a competitor, nor did they introduce any witness who would state that he had paid more for appellants' concrete than for a competitor's. 2/

2/ Appellants did submit two letters (Exs. T, U) from two customers stating that they preferred to use appellants' sand and gravel for concrete, because they considered it to be of high quality. There was no assertion that there was any economic advantage to using appellants' sand and gravel. Further, both letters are unreliable hearsay, as was the one statement made by appellants' expert witness that one user was willing to pay a little more for concrete hauled a

The only evidence in the record related to specific sales was for a period prior to the 1965 location of these claims (Exs. L, M). And that evidence (Ex. M), indicates that the sales were made mostly to private individuals or small companies. Consequently, it seems reasonable to infer that for that period, and probably for the period following it, most sales of concrete were to private users, for ordinary purposes, for which the appellants received an ordinary price. While the evidence does establish that this material is suitable for making high quality concrete, it is not sufficient to show that this is so unique or unusual as to warrant a finding that the material is an uncommon variety.

[4] Common varieties of a particular mineral material do not have to be physically alike or equally desirable for a given purpose. For example, many kinds of common rock may be used to build a wall and, because their physical properties differ, certain kinds of common rock may be preferred for this purpose and, in fact, make a better wall and command a better price. Nevertheless, they remain common varieties of rock because their physical properties are not unique or rare. United States v. Ligier, A-29011 (October 8, 1962); United States v. Shannon, 70 I.D. 136 (1963). This Board held similarly with reference to a deposit of cinders in United States v. Harenberg, 9 IBLA 77 (1973), stating:

(Fn. 2 Cont.)
further distance (Tr. 287). Since appellants' did not call these customers as witnesses, and consequently, there was no chance for cross-examination, we regard the statements as having little weight.

> A deposit of volcanic cinders which are suitable for use in the manufacture of cement blocks must be regarded as a common variety mineral material within the context of the Act of July 23, 1955, when the evidence shows that other such deposits occur commonly in the area and are similarly used, and the fact that the subject deposit has qualities which are particularly well-suited to this purpose does not alter its essential character as common cement block material.

Likewise, the Department has consistently held that deposits of sand and gravel suitable for all construction purposes, which may be superior to other deposits of sand and gravel found in the area because it is free of deleterious substances, and because of hardness, soundness, stability, favorable gradation, nonreactivity and nonhydrophilic qualities, but which is used only for the same purposes as other widely available, but less desirable deposits of sand and gravel are, nonetheless, a common variety of sand and gravel. United States v. Mt. Pinos Development Corp., 75 I.D. 320 (1968); United States v. Ramstad, A-30351 (September 24, 1965); United States v. Basich, A-30017 (September 23, 1964); United States v. Hensler, A-29973 (May 14, 1964); United States v. Henderson, supra.

The angularity of this sand and gravel is attributed to the fact that it has not been carried as far from its source by the action of the stream and, accordingly, it has been subject to less wear than have other such deposits in the area. While this may well make it more desirable for use as a concrete aggregate than other

nearby deposits used for the same purpose, we cannot agree that it is a unique quality.

[5] Further, we have repeatedly held that a deposit of otherwise common sand and gravel cannot be regarded as an uncommon variety on the basis that the deposit enjoys an economic advantage due to its proximity to the market. Where a particular mineral material is common, abundant and widespread, certain deposits of that material are bound to exist in closer proximity to the market than other such deposits, but this is only an extrinsic factor which does not make the material any less common. United States v. O'Callaghan, 8 IBLA 324, 79 I.D. 689 (1972); United States v. Stewart, 5 IBLA 39, 79 I.D. 27 (1972); United States v. Bedrock Mining Co., 1 IBLA 21 (1970).

[6] Appellants contend that they are entitled to receive a patent to the two placer claims on the basis of their compliance with 30 U.S.C. § 38 (1970) which provides, in pertinent part, as follows:

> Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter and sections 71 to 76 of this title, in the absence of any adverse claim; * * *.

Appellants maintain that this statute operates to invest them with title despite the fact that most of the land claimed was withdrawn from entry under the mining law, citing Belk v. Meagher, 104 U.S. 279 (1881). However, a reading of that case discloses that no withdrawal was involved.

The assertion that one may enter upon land which has been withdrawn from entry, effect a discovery thereon and possess such land for the period prescribed, and thus "cure the defective title of a location made on withdrawn land" is wholly untenable. Although Belk v. Meagher is not a case involving an entry on withdrawn land, some of the statements in the Court's opinion are instructive concerning the effect of such an entry, saying, at 284:

> * * * The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. * * *

Probably the most definitive analysis of 30 U.S.C. § 38 by the Supreme Court is found in Cole v. Ralph, 252 U.S. 286 (1920), in which the Court, at page 306, quotes with approval from the Secretary's decision in an earlier case, as follows:

> "The section was not intended as enacted, nor as now found in the Revised Statutes, to be a wholly separate and independent provision for the patenting of a mining

> claim. As carried forward into the Revised Statutes it relates to both lode and placer claims, and being in pari materia with the other sections of the Revision concerning such claims is to be construed together with them, and so, if possible, that they may all stand together, forming a harmonious body of mining law." Barklage v. Russell, 29 L.D. 401, 405-406.

The plain meaning of the foregoing is that 30 U.S.C. § 38 was enacted as part of the general mining laws and not as an independent adverse possession statute. It follows that section 38 is operative only as to those lands which are open to location under the general mining laws. In United States v. Midway Northern Oil Co., 232 F. 619, 634 (D. Calif. 1916), the Court held as follows with reference to 30 U.S.C. § 38 (R.S. 2332):

> * * * This is not a statute of limitations. It is a part of the chapter on Mineral and Mining Resources, and prescribes the evidence sufficient to establish the right of one who has possessed and worked a mining claim to a patent. It necessarily assumed that the lands were open to entry and patent under the mining laws. * * * it manifestly can have no application to a trespasser on land the title to which cannot be acquired under the law of the United States. The defendants' entry and possession was after the withdrawal order, and initiated no rights as against the government which could ripen into a title or a right to a patent.

More recently, section 38 was held not to apply to land closed to entry under the mining law in the case of United States v. Consolidated Mines and Smelting Co., 455 F.2d (9th Cir. 1971). This Board likewise so held in Merritt N. Barton, 6 IBLA 293, 79 I.D. 431 (1972).

Based upon all of the foregoing, we conclude that:

(1) All of the material with which we are here concerned is common variety sand and gravel not subject to location after July 23, 1955.

(2) All of the material occurs in placer form rather than in lode form.

(3) Lode locations will not support a claim to deposits of placer minerals.

(4) The Queen placer claim cannot be regarded as an amendment of the Queen lode claim because the two claims occupy entirely different tracts of land.

(5) The Queen lode claim, the Queen placer claim and the north portion of the Driftwood lode claim (approximately one half of the claim) are null and void ab initio because the withdrawal, which was imposed in 1925 and not revoked until 1963, precluded any appropriation of this land at any time when deposits of sand and gravel were subject to location under the mining law.

(6) 30 U.S.C. § 38 (1970) does not invest claimants with a right to receive a patent to lands which were closed to entry under the mining law at the time they took possession.

(7) To the extent that the location of the Driftwood placer claim occupies more land outside of the Driftwood lode claim than the minimum necessary to conform the old lode location to an aliquot part of a subdivision of the rectangular survey system, it is a location of new lands not previously claimed, possessed and occupied, and therefore void, as no new lands may be located for common sand and gravel after July 23, 1955.

(8) The land within the Driftwood lode claim which was outside the withdrawn area and not included in the 1965 location of the Driftwood placer claim was eliminated from further consideration by the final decision of this Department in 1966 which held that the lode claim was null and void.

Having thus disposed of the Queen lode and Queen placer claims in their entireties, and with portions of the Driftwood lode and Driftwood placer claims, we are confronted with the question of the validity of the only remaining area, i.e., that land outside the boundary of the withdrawal and within the limits of both the old Driftwood lode claim and the Driftwood placer claim. This area comprises something less than ten acres in its present configuration. (See Exhibit 13.)

In the decision below, the Administrative Law Judge did not deal separately with this tract. Instead, he merely found, as

we have, that the location of a lode claim will not support a claim to a placer deposit, and that the location of the Driftwood placer claim was initiated long after the time when common sand and gravel was subject to such location. On this basis he held that the entire Driftwood placer claim was null and void.

[7] However, appellants argue that technical deficiencies in the manner or method of the location and recordation are not material to the assertion of a claim perfected pursuant to 30 U.S.C. § 38 (1970). To the extent that such claims relate to lands and minerals which are subject to location under the mining laws, we agree. The provision offers an alternative to proving strict compliance with the laws applicable to lode and placer location, for if the claimant could prove that he would have no need of section 38, and it must be presumed that in enacting this provision the Congress did not intend a vain and needless thing.

An examination of the history of the provision suggests that, indeed, one of its purposes was to regularize the possession of placer deposits by claimants who had entered, located, held and worked such deposits under the law relating to lode claims before the enactment of the statute which authorized placer locations. The provision was, in fact, originally enacted as section 13 of the Act of July 9, 1870 (16 Stat. 217), commonly known as "The Placer Act," and was brought forward into the Revised Statutes

without any material change of language. See Barklage v. Russell, 29 L.D. 401, 405 (1900). There was early judicial recognition that the section could be employed in proper cases to excuse a claimant's inability to demonstrate strict compliance with the other provisions of the mining laws and to create a presumption that claim was properly located. In Harris v. The Equator Mining and Smelting Co., 8 F. 863 (C.C.D. Colo. 1881), the Court said:

> * * * Upon a familiar principle, it was said, a locator of a mining claim on the public lands is required to conform to the statute and the local rules of the mining district in which his claim may be situated, in order to establish his right to a full claim, and that a grantee of the locator should be held to the same proof. This, however, embraces something more than the principle that the title to and the right to occupy the public mineral lands can only be acquired in the manner prescribed by law. Conceding that proposition, it does not follow that a locator in actual occupancy, who has been evicted by a wrong-doer, must give evidence of every fact necessary to a valid location in an action to recover possession; not on the ground that the essentials of a valid location are in any case to be omitted, but that in support of undisturbed possession, long enjoyed, a presumption may in some cases arise that the location was at first well made. The statute of limitations enacted by the state and recognized in the act of congress, is founded on this principle. * * * (At 865) (Emphasis added).
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> * * * A presumption is indulged that the location was regularly made in the first place, and the party in possession is allowed to remain so long as he shall comply with the conditions on which he holds the estate. The circumstance that a miner's estate in the public lands is subject to conditions, on failure of which it will be defeated, is not controlling. * * * (At 866) (Emphasis added).

Courts of the several public domain states have apparently experienced little difficulty in concluding that this section obviates the necessity of the claimant's proving the validity of the initial location where he possesses the necessary qualifications as to citizenship, has lawfully entered, effected a discovery, performed his annual assessment work, and worked the claim for the prescribed period. See, e.g., Eagle-Picher Mining and Smelting Co. v. Meyer, 204 P.2d 171 (Sup. Ct. Arizona 1949); Judson v. Herrington, 162 P.2d 931 (C.A., Calif. 1945); Oliver v. Burg, 58 P.2d 245 (Sup. Ct. Oregon 1936); McLean v. Ladewig, 37 P.2d 502 (C.A. Calif. 1934); Dalton v. Clark, 18 P.2d. 752 (C.A. Calif. 1933) (millsite); Humphreys v. Idaho Gold Mines Development Co., 120 P. 823 (Sup. Ct. Idaho 1912); Upton v. Santa Rita Mining Co., 89 P. 275 (Sup. Ct. New Mexico 1907). In a Utah case the Court held that section 38 could be invoked in favor of a claimant who had entered land available only for placer claims and attempted several lode locations, had worked the building stone deposit for 20 years and expended large sums of money in open and exclusive possession prior to plaintiff's attempt to locate the ground as a placer claim. Springer v. Southern Pacific Co., 248 P. 819 (Sup. Ct. Utah 1926). In that case the Court said the following at 823:

> * * * As to whether respondent may avail itself of the provisions of section 2332, supra, however, where, as here, the attempted lode location failed because no discovery of valuable mineral was made by discovering rock in place, as that

> term has always been construed and applied by the courts, is, perhaps, not without some difficulty. The record in this case leaves no room for doubt that every other legal requirement except the discovery of valuable mineral in rock in place has been met by the respondent. Neither is there any doubt that an honest attempt was made by respondent to make a lode location, and that in view that no proper discovery was made no valid or legal lode location was made. Notwithstanding that fact, however, respondent has fulfilled every other legal requirement. It expended more than a half million dollars in working and making improvements on the mining claims that it had attempted to locate as lode claims, but which unfortunately constituted placer ground instead, and should have been located as placer claims. Moreover, for more than 20 years before appellants made any attempt to locate the ground as placer ground, respondent had maintained actual and exclusive possession of its claims and made permanent and valuable improvements thereon. Then, again, respondent was in actual, open, and visible possession of the claims and was developing and constantly using the only minerals contained therein when the appellants made their attempt to locate the ground as placer claims, of which respondent was in actual possession and was extracting mineral therefrom, all of which appellants knew, and for a long time prior to their attempted location had known.

Several early Departmental decisions are in accord with the proposition that a claimant who, invoking the provisions of section 38, proves that he, or his grantor, has held and worked the claim for the period prescribed, is not required to produce record evidence of his location, or to give any reason for not producing such evidence. Capital No. 5 Placer Mining Claim, 34 L.D. 462 (1906); The Little Emily Mining and Milling Co., 34 L.D. 182 (1905); Gaffney v. Turner, 29 L.D. 470 (1900); Brady's Mortgagee v. Harris, 29 L.D. 426 (1900); Barklage

v. Russell, supra. Recent decisions of this Board have held that a finding that a claim was void ab initio by reason of having been located on withdrawn land would not dispose of the claimant's rights under 30 U.S.C. § 38 (1970) based upon his occupancy after the land was restored to entry. Gardner C. McFarland, 8 IBLA 56 (1972); Merritt N. Barton, supra.

Several of the decisions of the various state courts cited above rely upon the declaration made by the United States Supreme Court in Belk v. Meagher, supra, at 287, that if the claimant actually held and worked the claim for the requisite time under section 38 he would have "secured what is here made the equivalent of a valid location."

[8] Accordingly, the question presented as to the land outside the boundaries of the withdrawal and within the limits of both the old Driftwood lode claim and the Driftwood placer claim may be stated as follows:

> If the claimants possess the essential qualifications as to citizenship, and if they peacefully entered and occupied the land and discovered a valuable deposit of common variety mineral thereon at a time when both the land and the mineral was subject to appropriation under the mining laws, and if they thereafter remained in peaceful exclusive possession and openly worked the claim for the period prescribed by the Arizona statute of limitations for mining claims, and expended at least the minimum amount of money prescribed by law in the improvement of the claim, all such actions having been accomplished prior to July 23, 1955, have they thereby established their right to receive a patent pursuant to 30 U.S.C. § 38

> (1970) notwithstanding their failure to file a location notice initially and despite their error in subsequently locating and recording their claim under the statute pertaining to lode locations rather than properly under the placer mining law?

Although we were unable to find any case in which this precise question was previously decided by this Department 3/, while the draft of this opinion was in preparation the Court of Appeals for the Ninth Circuit rendered its opinion in United States v. Haskins, 505 F.2d 246 (filed Oct. 25, 1974), in which the Court treated the question and answered it affirmatively, saying:

> * * * The District Court stated the following as the controlling questions of law involved in its decision:
>
> "1. Can the defendant pursue his application for patent of the Haskins' Placer Mining Claim pursuant to Title 30 U.S.C. § 38 where his lode claims under which he had previously worked the property have been declared invalid for lack of discovery?
>
> "2. Does defendant's possession of the property which antedates the effective date of the Watershed, Withdrawal Act of 1928 by more than five years, entitle him to proceed with his patent application notwithstanding the fact that his notice of intention to hold as a placer mining claim was not filed until subsequent to the effective date of the Watershed Withdrawal Act?

3/ The question was presented in a previous appeal to the Secretary in United States v. Alice A. and Carrie H. Boyle, (Supp.), 76 I.D. 318 (1969), a case which bears numerous striking similarities to this case. However, that case was resolved on a finding that the claim was not supported by a discovery and no ruling was made on the issue here presented. (Judicial review pending in the Court of Appeals for the Ninth Circuit sub nom. Morton v. Boyle, Civ. No. 72-2690.)

* * * * * * *

This savings clause [30 U.S.C. § 38] has been part of the general mining law since 1870 (16 Stat. 217). Its purpose is to obviate the necessity of proving formal compliance with requirements for locating a claim but not to dispense with proof of discovery. Cole v. Ralph, 252 U.S. 286 (1920).

We agree with the district court that the section is applicable to this case. The evidence unequivocally shows that Haskins and predecessors have been in possession of the ground and have worked the claims for over half a century and for much longer than five years prior to the enactment of the Watershed Withdrawal Act of May 29, 1928. Section 38 permits them to assert valid placer locations for the ground in question without proof of posting, recording notices of location and the like. Springer v. Southern Pac. Co., 248 P. 819 (Utah 1926); Newport Mining Co. v. Bead Lake G.C.M. Co., 188 P. 27 (Wash. 1920); Humphreys v. Idaho Gold Mines Etc. Co., 120 P. 823 (Ida. 1912).

* * * * * * *

Haskins having occupied and worked the ground for more than five years may assert placer locations without proof of recording and posting. He must, nevertheless, prove discovery of a valuable mineral because the statute has no application to a trespasser on public lands, title to which cannot be acquired by entry under the mining laws of the United States. Cole v. Ralph, supra; Chanslor-Canfield Midway Oil Co. v. United States, 266 F. 145 (9th Cir. 1920).

* * * * * * *

7. ANSWERS TO CONTROLLING QUESTIONS OF LAW CERTIFIED BY THE DISTRICT COURT.

(a) Haskins may pursue his application for patent of the Haskins' Placer Mining Claim pursuant to 30 U.S.C. § 38, but may not base his claim of discovery of a valuable mineral upon the presence of dolomite or dolomite limestone in lode formation.

> (b) The notice of intention to hold the placer claims recorded in 1968 does not preclude Haskins from asserting the validity of the claims based on actual possession and working of the claims for more than five years prior to the Watershed Withdrawal Act of 1928, proof of posting and recording notices of placer locations at or about the date of occupancy being obviated by 30 U.S.C. § 38.
>
> * * * * * * *

[9] However, the record made at the hearing of this contest falls far short of establishing that the Guzmans have indeed qualified under section 38. They have adduced evidence tending to show that they have produced sand and gravel from the vicinity of these claims since the 1940's, presumably at a profit, but it is not settled when they entered the small tract of land in question, when they effected a discovery on that tract, when they commenced to work it, and for how long such work continued. As indicated above, the claimants must show that they had perfected their right to receive a patent pursuant to section 38 prior to July 23, 1955, because no claim for a deposit of common sand and gravel can be perfected by any means after that date.

Further evidence must be adduced relative to the claimants' compliance or non-compliance with the requirements which are essential to the establishment of a valid claim pursuant to 30 U.S.C. § 38 (1970) as to the area described above, and the case will be remanded for a hearing and decision limited to this issue.

The Administrative Law Judge was correct in his conclusion that the designated claims, as such, are wholly invalid for the reasons given in his decision. We find, however, that the claimants' right to the small area which lies within the boundaries of the Driftwood placer claim does not depend upon the validity of the location of the Driftwood placer claim or the Driftwood lode claim, but rather upon the prior use and occupancy of the land, if any, pursuant to 30 U.S.C. § 38. The only relevance of the formally located Driftwood placer and lode claims to that issue is that they serve to delineate the area which was claimed by the appellants prior to July 23, 1955, and subsequently, which may be subject to the assertion of a claim under section 38. Therefore, while we affirm the decision that the Queen and Driftwood placer claims are invalid, we find that this holding does not dispose of the claimants's rights under section 38, and we must set aside the Judge's holding that the contestees did not acquire any rights to any portion of the Driftwood placer claim by virtue of 30 U.S.C. § 38 (1970).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside as to the issue delineated above and remanded for further proceedings relative to that issue, and the decision is affirmed as to all other holdings.

Edward W. Stuebing
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Douglas E. Henriques
Administrative Judge